Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Regarding	)	MM Docket No. 94-149
Minority and Female Ownership of	)	
Mass Media Facilities	)	MM Docket No. ~~94-140~~ 91-140
	)	

REPLY COMMENTS OF

Black Citizens for a Fair Media
Center for Media Education
Chinese for Affirmative Action
Communications Task Force
Feminist Majority Foundation
Hispanic Bar Association
League of the United Latin American Citizens
National Conference of Puerto Rican Women
Office of Communications of the United Church of Christ
Philadelphia Lesbian and Gay Task Force
Telecommunications Research Action Center
Wider Opportunities for Women
Women's Institute for Freedom of the Press

Ilene R. Penn, Esq.
Angela J. Campbell, Esq.
Citizens Communications Center Project
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W., #312
Washington, D.C. 20001
(202) 662-9535

Andrew Jay Schwartzman, Esq.
Gigi Sohn, Esq.
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036
(202) 232-4300

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SUMMARY

The Commenters listed herein represent the interests of men and women of diverse racial and ethnic backgrounds, who are listeners and viewers of broadcast radio and television. Greatly disturbed by the underrepresentation of minorities and women as owners of mass media facilities and the resulting lack of diversity in programming, Commenters urged the Commission in their original Comments to adopt an incubator program as a means to increase ownership opportunities for minorities and women.

Since Commenters' original filing, the Supreme Court issued Adarand Constructors Inc. v. Pena, 63 U.S.L.W. 4523 (U.S. June 12, 1995)(No. 93-1841) which requires all race-based classifications to meet strict scrutiny. In these Reply Comments, Commenters explain why the implementation of an incubator program is narrowly tailored to meet a compelling governmental interest. The Government has a compelling interest in remedying past and present discrimination against minorities in lending, education and employment. The Government also has a compelling interest in increasing program diversity.

Moreover, because alternative race-neutral measures have failed to increase the number of minority owners and diversity of programming, the Commission has the authority to implement a program designed to redress the dearth of minority representation in the broadcast industry. Commenters believe the incubator program can be implemented such that it is narrowly tailored to promote these compelling governmental interests.

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In their original filing, Commenters urged the Commission to adopt incentives to increase ownership opportunities of mass media facilities for minorities and women. Commenters demonstrated that minorities and women were substantially underrepresented as owners of mass media facilities due to their inability to obtain the capital necessary to purchase facilities.

To promote minorities' and womens' ability to obtain capital, Commenters proposed the Commission should adopt a carefully structured incubator program. An incubator program would encourage existing broadcasters to share their talent and experience, but most importantly, their financial resources with minorities and women in exchange for regulatory concessions such as relief from certain multiple ownership restrictions. Commenters strongly believed that implementation of such an incubator program would increase ownership opportunities for minorities and women.

Having reviewed the comments filed in this proceeding, Commenters conclude no new evidence was presented to prevent the Commission from implementing an incubator program as originally proposed by Commenters. Given that, these reply comments address only the implications of the Supreme Court's recent decision in Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523 (U.S. June 12, 1995)(No. 93-1841) on the adoption and implementation of an incubator program for minorities.[1]

In Adarand, the Supreme Court held all racial classifications imposed by a federal, state or local government actor, must be analyzed by a reviewing court under strict

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[1] Commenters continue to support adoption of an incubator program on behalf of women. The Adarand decision did not address the appropriate standard of review for programs designed to increase opportunities for women, except to stress that the standard for federally mandated gender based classifications remains intermediate scrutiny. Adarand, 63 U.S.L.W. at 4536 (Stevens, J., dissent). Because women were not contemplated by the Adarand decision, they are not addressed in these Reply Comments.

scrutiny. Adarand, 63 U.S.L.W. at 4530. Therefore, any programs adopted in the wake of Adarand must be narrowly tailored to serve a compelling governmental interest. Commenters believe implementation of an incubator program on behalf of minorities would withstand strict scrutiny.

I. IMPLEMENTATION OF AN INCUBATOR PROGRAM IS NARROWLY TAILORED TO SERVE THE GOVERNMENT'S COMPELLING INTERESTS IN REMEDYING PAST DISCRIMINATION IN OWNERSHIP OPPORTUNITIES AND PROMOTING DIVERSITY IN PROGRAMMING

Adoption of an incubator program for minorities would withstand strict scrutiny because it promotes the government's compelling interest in remedying the historic and current discrimination faced by minorities in obtaining capital from lending institutions. It also remedies the exclusion of minorities from ownership opportunities because of the lingering effects of past discrimination in employment and education. Adoption of an incubator program also promotes the government's separate, but equally compelling interest in providing diverse news and public affairs programming for all listeners and viewers.

Because the Commission has a long history of considering race-neutral alternatives that have failed to increase ownership opportunities and to diversify programming, the Commission has the authority to adopt an incubator program to redress these concerns. Moreover, the Commission has the flexibility to fashion an incubator program that is narrowly tailored to meet these compelling interests.

A. The Government Has A Compelling Interest in Remedying Past and Present Discrimination Against Minorities in Lending, Education and Employment

Remedying past and present discrimination against minorities in lending, education and employment is a compelling governmental interest. As explained in their original Comments, although the telecommunications industry represents one-sixth of the United States economy and is growing, minorities own less than three percent of all media outlets in the United States.[2] Minorities are excluded from participating as mass media owners because of discrimination in lending which has prevented them from obtaining the capital necessary to purchase media facilities. See Black Citizens for A Fair Media et al Initial Comments at 30-43 [hereinafter Comments](discussing how minorities have relatively less personal wealth to invest than other small businesses and that financial institutions discriminate against minorities, even when their education and income are equal). Both the Federal Communications Commission and the National Telecommunications Information Agency have recognized the communications industry as a key growth area for

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[2] In 1994, only 323 of 11,128 broadcast facilities were owned by minorities. The Minority Telecommunications Development Program, National Telecommunications and Information Administration, Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in the United States (Sept. 1994)[hereinafter 1995 NTIA Report]. Minorities owned 31 of 1,155 television stations, or 2.9 percent. Id. Of the 9,973 radio stations, minorities owned 292, or 2.9 percent. Id.

minorities.[3] However, before minorities can participate in the telecommunications revolution, they must first overcome the barriers to obtaining capital--barriers, not similarly faced by other small businesses trying to finance the purchase of a mass media facility. Id. Therefore, encouraging and enabling all members of society to participate in our national economy is a compelling governmental interest as it ensures economic growth not just for minorities, but for the United States as a whole.[4]

Adoption of an incubator program also remedies the exclusion of many minorities from ownership opportunities due to past discrimination in education and employment.[5] At the time most broadcast licenses were originally distributed, many minorities faced discrimination in education and in employment,[6]

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[3] U.S. Commission on Minority Business Development, Final Report, at 13. See also 1995 NTIA Report at 31, citing Andrew F. Brimmer, The Economic Cost of Discrimination, Black Enterprise, Nov. 1993, at 27 ("racial bias deprived the American economy of $215 billion in 1991, equal to 3.8% of the gross domestic product"); Testimony of Larry Irving, Assistant Secretary for Commerce and Information, U.S. Dept. of Commerce before the House Committee on Commerce and Subcommittee on Telecomm. and Finance on H.R. 1555 Revisions Communications Act of 1995 (May 11, 1995).

[4] 1995 NTIA Report at 2.

[5] Congress found "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." Conf. Rep. No. 765, 97th Cong., 2d Sess. 1, 43 (1982)(discussing adoption of lottery system).

[6] Commission findings of discrimination against minorities in employment in broadcasting lead to the adoption of Nondiscrimination Employment Practices of Broadcast Licenses, 13 F.C.C.2d 766, 769 (1968).

thus they were unable to compete for the limited licenses available.[7] Comments at 32. Now that more minorities have the education and experience to successfully own mass media facilities, they still face substantial obstacles. The number of broadcast licenses available remains limited. Most licenses are held by non-minorities who are practically guaranteed renewal.[8] Thus, the only way minorities can obtain broadcast licenses is through the purchase of an existing station, which in turn requires large amounts of capital.

B. The Government Has a Compelling Interest in Increasing Programming Diversity for Viewers and Listeners

In addition to redressing discrimination against minorities in lending, education and employment, the government also has a compelling interest in increasing program diversity for viewers and listeners. In 1990, the Supreme Court in Metro Broadcasting, 497 U.S. 547 (1990), upheld diversity as an alternative compelling governmental interest. Nothing in Adarand suggests that the diversity rationale has been eliminated. In fact, Justice Stevens went to great lengths in Adarand to explain why diversity remains an alternative rationale: "[t]he proposition that fostering diversity may

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[7] See David Honig, The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 How. L.J. 859, 873-877 (1984) (discusses historic exclusion of minorities from broadcast ownership opportunities due to discrimination in education, employment and membership in trade associations).

[8] Id. (discussing how scarcity of licenses results in either no ownership opportunities for minorities or in ownership of stations with little value).

provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today--indeed, the question is not remotely presented in this case--and I do not take the Court's opinion to diminish that aspect of our decision in Metro Broadcasting."[9] Id. at 4539 (Stevens, J., dissent).

Implementing regulations to promote diverse programming is compelling because the power and influence of the broadcast media over the lives of Americans simply cannot be overstated. Americans overwhelmingly rely on broadcasting as their primary news source. See D. Bartlett, The Soul of a news Machine: Electronic Journalism in the Twenty First Century, 47 Fed. Com. L.J. 1, 17 (Oct. 1994). Therefore, owners and editors of mass media, who determine what information to broadcast, play an influential role in their audiences' lives. Broadcasters have the power to shape what people see by the way of their editorial judgments.

This influence of broadcasting over public opinion underscores the importance of this country's broadcast licensing scheme, which mandates that licensees serve the "public interest." 47 U.S.C. 309(a)(1994). As recognized by the Supreme Court in FCC v. National Citizens Committee for Broadcasting, ""[t]he public interest" standard necessarily invites reference to First Amendment principles,' and in particular to the First

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[9] See also California v. Bakke, 438 U.S. 265 (1978)(holding increasing the racial and ethnic diversity of the student body at a university is a constitutionally compelling interest because it enriches the academic experience on campus).

Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources."" 436 U.S. 775, 795 (1978)(quoting CBS v. Democratic National Committee, 412 U.S. 94, 122 (1973); Associated Press v. United States, 326 U.S. 1, 20 (1945)).

It is precisely the objective of exposing the public to a wide variety of diverse viewpoints which the incubator program seeks to achieve by promoting diversity in ownership and operation of broadcast facilities. Given the power of the media to influence the public's perception of the world and lack of minority participation, that interest is all the more compelling. Indeed, the Communications Act conferred broad authority upon the FCC to carry out the "obligation . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." NAACP v. FPC, 425 U.S. 663, 670 n.7 (1976)(citing Office of Communication of United Church of Christ v. FCC, 359 F.2d 944 (D.C. Cir. 1966).

The conclusion that promoting diversity in broadcast ownership and operation is a compelling interest is reinforced by the nature of the FCC licensing process. Those who do receive broadcast licenses are granted a temporary privilege, rather than ownership of the frequencies. 47 U.S.C. § 301 (1982). However, as a practical matter, licensees are routinely granted renewals of their license as long as they serve the public interest. Because the number of applicants exceeds the number of available licenses, the Supreme Court has repeatedly

stated that "those who are granted a license to broadcast must serve . . . as fiduciaries for the public by presenting 'those views and voices which are representative of their communities.'" League of Women Voters of California, 468 U.S. 364, 377 (1984) (quoting Red Lion, 395 U.S. 367, 389 (1969)). At the same time, however, broadcasters also have considerable latitude in the use of their licenses. See CBS v. FCC, 543 U.S. 367, 395 (1981) quoting CBS v. DNC, 412 U.S. at 110). The FCC has recognized that license "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of [broadcast] presentation.'" FCC v. NCCB, 436 U.S. 775, 785 (1978)(quoting Rules Relating to Multiple Ownership of Standard, FM and Television Stations, Second Report and Order, 50 F.C.C.2d 1046, 1050 (1975)).

Thus, although broadcasters enjoy wide editorial freedom under the First Amendment, the public also has a First Amendment right to receive the widest possible dissemination of information. When these two interests clash, a sensitive accommodation is required. Precisely because of the editorial freedom of licensees and because of the profound influence they exert over public opinion, the FCC has a compelling interest in assuring that broadcast ownership is widely dispersed. Only through regulation of ownership can the FCC assure the kind of diversity vital to the democratic process without interfering with broadcasters' equally vital constitutional right of editorial freedom. Thus, increasing ownership opportunities

simultaneously increases programming diversity and both are compelling governmental interests.

C. The Incubator Program is Narrowly Tailored to Promote Ownership Opportunities for Minorities and Greater Programming Diversity for Listeners and Viewers

Under strict scrutiny analysis, race-conscious measures must also be narrowly tailored to achieve their goals. See Croson, 488 U.S. 469 (1988) ; Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). In Adarand, the court suggests narrowly tailoring contemplates whether there was consideration of race-neutral means to increase minority ownership opportunities and increase programming diversity or "whether the program was appropriately limited such that it 'will not last longer then the discriminatory effects it is designed to eliminate.'" Adarand, 63 U.S.L.W. at 4533 (citing Croson 488 U.S. at 507; Fullilove, 448 U.S. at 513). Adoption and implementation of an incubator program clearly satisfies each of these criteria.

1. Alternative measures have failed to increase the number of minority owners and diversity of programming

A majority of the court in Croson stated that before a racial preference can be employed, there must have been "consideration of the use of race-neutral means to increase minority business participation." Croson, 488 U.S. at 507; see also Paradise, 480 U.S. at 171. Here, there has been more than mere "consideration" of race-neutral alternatives by the FCC. See generally Brief of FCC in Astroline, No. 89-700, at 38-42.

Adoption of race-neutral alternatives designed specifically to achieve diversity of viewpoints in programming have not succeeded. As an example, for many years the Commission's "ascertainment rules" required licensees to contact community leaders and members of the general public to obtain programming responsive to those interests. See, e.g., Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971); Ascertainment of Community Problems by Applicants, 57 F.C.C.2d 418 (1976). The Commission included minority and ethnic groups as a significant segment of the community whose views were to be ascertained. 57 F.C.C.2d at 419, 447. Subsequently, however, the Commission found that,

> While the broadcasting industry has on the whole responded positively to its ascertainment obligations .. . we are compelled to observe that views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public.

1978 Policy Statement, 68 F.C.C.2d at 980-981 (citations omitted).

Other race-neutral initiatives to diversify ownership and to increase diverse programming have similarly failed to increase minority owners and voices. Beginning in the earliest days of broadcasting, the Commission implemented a host of race- and gender-neutral ownership limits designed to diversify ownership of mass media facilities and increase programming diversity. These rules included the duopoly rules, the national ownership limits, the radio cross-ownership rules and the cross

interest rules. Although these policies were aimed at increasing programming diversity, they also implicitly increased opportunities for minorities and other underrepresented parties to become mass media owners.

However, as of 1978, minorities owned less than one percent of all commercial radio and television broadcast stations. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979, 981 (1978). Concluding minorities were underrepresented as mass media owners, the Commission found it necessary to implement race-based programs to address the dearth of minority owners and programmers. In 1978, the Commission implemented the tax certificate, distress sale, and comparative hearing minority preference policies. Id.

However each of these Commission initiatives has subsequently been abolished or is rarely used. The Commission's most successful program to increase actual ownership opportunities, the tax certificate policy, was abolished in April 1995. The Self-employed Persons Health Care Extension Act of 1995, Pub. L. No. 104-7 (Apr. 11, 1995). Prior to its termination, the Commission issued 536 tax certificates between 1943 and 1994 under the tax certificate program, of which approximately 359 involved sales to minorities.[10] However, this program is no longer available.

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[10] Statement of William E. Kennard, General Counsel, Federal Communications Commission before the United States Senate Committee on Fiance on FCC Administration of Internal Revenue Code Section 1071 (Mar. 7, 1995) at 11.

Likewise, the Commission's once successful distress sale policy has outgrown its usefulness as the FCC rarely places licensee's stations in "distress." Thus, the distress sale policy is rarely, if ever, used.[11] Similarly, the minority enhancement to the multiple ownership rules and preferences in comparative hearings have failed to significantly increase ownership opportunities for minorities and diversity of programming for viewers and listeners.[12]

While the ownership rules and other policies have prevented excessive concentration, they have not substantially increased ownership opportunities for minorities, as minorities still own less than three percent of all broadcast stations. The Minority Telecommunications Development Program, National Telecommunications and Information Administration, Analysis and Compilation of Minority-Owned Commercial Broadcast Stations in

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[11] See Testimony of Raul Alarcon, Jr., President and CEO of Spanish Broadcasting System, Inc., before the Senate's Committee on Finance (Mar. 7, 1995)("[b]etween 1978-1994, only 42 distress sales were approved--on average less than four a year. Indeed there is no guarantee in any given year that there will be any stations available for distress sales at all."); See also Kurt Wimmer, The Future of Minority Advocacy Before the FCC: Using Marketplace Rhetoric to urge Policy Change, 41 Fed. Com. L.J. 133, 145-146 (Apr. 1989)(between 1978-1988, thirty eight distress sales occurred, however the policy is not currently used).

[12] Testimony of Amador S. Bustos to the Ways and Means Committee, House of Representatives, Concerning the FCC's Minority Tax Certificate Program (Jan. 17, 1995)("[a] minority media entrepreneur . . . has only two options: (1) to seek a license from the FCC or (2) to buy an existing one. Despite all the minority preferences provided by the FCC in the comparative hearing it is extremely difficult to get a license through this method . . . Rather, because of the length of time the process takes and its high expense, I have been "beaten by money.")

the United States (Sept. 1994). Race-neutral and race-based measures have failed to increase ownership opportunities for minorities because they have not been specifically targeted to address minorities needs.

Thus, it is necessary for the Commission to adopt a program that will promote ownership opportunities for minorities by specifically addressing the one barrier--lack of financial resources--that prevents them from becoming mass media owners. Enabling minorities to obtain capital to purchase mass media facilities will concurrently improve programming diversity for viewers and listeners. The Supreme Court in Metro found that "[a] broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 580 (1990). Thus, an increase in minority ownership correlates directly to an increase in diverse programming for viewers and listeners.

2. The Commission has the flexibility to implement an incubator program in a way that it would be narrowly tailored to meet the government's compelling interest

The Commission can implement the incubator program in a way that would be narrowly tailored to meet the government's interests in increasing ownership opportunities and programming diversity. To that end, the Commission could employ a net worth threshold to ensure that the incubator program is available only to minority and female operators who truly need assistance

obtaining capital. NPRM at 17. Limiting the program in this fashion would promote ownership opportunities by helping only those minorities who would otherwise be unable to own television and radio stations. Utilizing a net worth threshold also employs race as only one factor considered in qualifying for the program. Therefore, there is no automatic proxy for individual's solely based on their race.

In addition, the Commission has the discretion to assure the financial assistance given to the incubatee, whether in the form of direct equity participation, loan guarantees, or long-term low interest loans, is significant enough to lead to actual ownership. A program designed in this fashion directly addresses minorities' need for financial assistance.

The Commission also has the authority to require the minority incubated owner to hold the incubated facility for three years. In adopting a three year holding period, the Commission could prevent abuse of the policy through trafficking and could also ensure that the government's compelling interest in increasing community access to diverse programming is realized by virtue of the minority owner's control and influence over the station, its hiring decisions and programming.

Additionally, because the incubator program is not a set aside or a quota, but rather an incentive program, it benefits both the minority beneficiary and the third party incubator. In fact, there is no burden on third parties by implementing an incubator program. Adoption of an incubator program benefits

third parties by enabling those who choose to incubate minority owners to acquire stations above the national ownership limits. Thus, the incubator program provides an incentive to third parties who otherwise would not be able to increase their current holdings.

In this regard, the contracting case contemplated in Adarand is distinguishable from implementation of an incubator program. In contracting, advantaging one minority contractor over a non-minority contractor, burdens the non-minority contractor by imposing an artificial limit on the contracting opportunities available to them. In contrast, the broadcasting industry is unique in that it has limited entry due to spectrum scarcity and an overwhelming economic barrier due to the high cost of transactions. It is too late for minorities to take advantage of many ownership opportunities because past de facto and de jure discrimination prevented all but a few from competing for licenses when they were first distributed. Therefore, implementation of an incubator program merely enables minorities to overcome the past discrimination that prevented them from participating as owners and to take advantage of those opportunities now. It does not set aside a certain number or percentage of licenses specifically for minorities or advance minority interests to the exclusion of third parties.

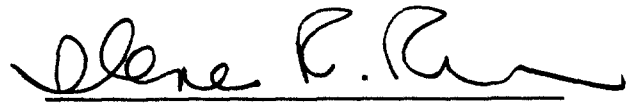
Finally, it is implicit in the program itself, that it would last only as long as it is needed to increase ownership opportunities for minorities and to diversify programming.

Moreover, by requiring an existing owner to incubate two minority facilities for each additional facility it is permitted to acquire over the ownership limits, the Commission would hasten minority entrance into ownership of mass media facilities and expedite the distribution of diversified programming. The Commission should also make explicit that it will periodically review the efficacy of the program and support withdrawal of the program once the government's compelling interests have been met.

Conclusion

Adoption of incubator program furthers the compelling governmental interest in remedying past and present discrimination faced by minorities in lending, education and employment and promoting diversity in programming. Moreover, the incubator program is narrowly tailored to remedy the effects of prior economic discrimination faced by minorities while simultaneously promoting broadcast diversity for all viewers and listeners.

Respectfully submitted,



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